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MEMORANDUM

TO: Committee on Legal Services

FROM: Thomas Morris, Office of Legislative Legal Services

DATE: November 1, 2019

SUBJECT: Rules of the Mined Land Reclamation Board, Department of Natural Resources, concerning construction materials, 2 CCR 407-4 (LLS Docket No. 190334; SOS Tracking No. 2019-00151).¹

Summary of Problem Identified and Recommendation

Section 34-32.5-111 (1)(b), C.R.S., prohibits a one-time excavation project from employing material processing activities typically associated with mining operations. But the Mined Land Reclamation Board (Board) Rule 1.1 (50.1)(d) authorizes the Office of Mined Land Reclamation (Office) to approve material processing activities typically associated with mining operations. **Because this rule conflicts with the statute, we recommend that Rule 1.1 (50.1)(d) of the rules of the Board concerning construction materials not be extended.**

¹ Under § 24-4-103, C.R.S., the Office of Legislative Legal Services reviews rules to determine whether they are within the promulgating agency's rule-making authority. Under § 24-4-103 (8)(c)(I), C.R.S., the rules discussed in this memorandum will expire on May 15, 2020, unless the General Assembly acts by bill to postpone such expiration.

Analysis

The Office cannot approve a mining activity that the statute specifically prohibits.

Section 34-32.5-111 (1)(b), C.R.S., authorizes a mining permit for a one-time excavation of construction materials, and specifies that a one-time excavation project must "not employ material processing activities typically associated with mining operations." The statute does not specify the types of activities that are typically associated with mining operations, but categorically precluded one-time excavation projects from employing such activities. The Board's rule-making authority does not allow it to adopt a rule that conflicts with the statute:

34-32.5-108. Rules. The board may adopt and promulgate reasonable rules respecting the administration of this article.

In contrast, Rule 1.1 (50.1)(d), in defining a "Special One-time Excavation 111(1)(b) Operation Permit," states that it applies to:

. . . any operation of a one-time excavation project which:
(d) does not employ material processing activities typically associated with mining operations, such as crushing, washing, or asphalt and concrete production, **unless approved by the Office; (Emphasis added)**

The rule thus carves out an exception for activities approved by the Office, whereas the statute imposes an absolute prohibition. The rule therefore conflicts with the statute and should not be extended.

Recommendation

We therefore recommend that Rule 1.1 (50.1)(d) of the rules of the Board concerning construction materials not be extended because it conflicts with the statute.